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January 24, 2001

**AGENDA ITEM**  
For Meeting of: 1-25-01

**MEMORANDUM**

**SUBMITTED LATE**

TO: The Commission

THROUGH: James A. Pehrkon  
Staff Director

FROM: Lois G. Lerner  
Acting General Counsel

N. Bradley Litchfield  
Associate General Counsel

Jonathan M. Levin  
Senior Attorney

SUBJECT: "Redline" revisions to Draft Advisory Opinion 2000-40, Agenda Document No. 01-4

Attached is a line in, line out, draft that incorporates the several revisions that have been discussed with Commissioners' offices since circulation last week of the cited agenda document.

OGC proposes that this document be used to facilitate discussion of the specific revisions to, and other content of, the draft opinion.

Accordingly, we request that it be circulated as a late agenda document for the January 25, 2001 meeting.

Attachment

2  
3 The Honorable Jim McDermott  
4 U.S. House of Representatives  
5 Washington, DC 20515-4707  
6

7 Dear Mr. McDermott:

8 This responds to your letter dated December 4, 2000, requesting an advisory  
9 opinion concerning the application of the Federal Election Campaign Act of 1971, as  
10 amended (“the Act”), and Commission regulations to the establishment of a legal expense  
11 fund and donations to the fund by other Members of Congress using their principal  
12 campaign committees.

13 You are a Member of the U.S. House of Representatives from the Seventh District  
14 of Washington. You have set up a legal defense fund named the Jim McDermott Legal  
15 Expense Trust (“Legal Expense Trust ” or “Trust”) for the purpose of paying legal  
16 expenses arising from the case of *Boehner v. McDermott*, a matter which is now pending  
17 before the U.S. Supreme Court. This fund is “separate and apart” from your principal  
18 campaign committee. You state that Representative Fortney H. (Pete) Stark of California  
19 and other members of Congress have offered to donate excess campaign funds to the  
20 Legal Expense Trust and have authorized you to ask whether such donations would be  
21 permissible under the Act.

22 ***Factual Background***

23 ***Boehner v. McDermott***

24 This matter involves a civil suit against you filed by Representative John Boehner  
25 of Ohio alleging that you knowingly disclosed an unlawfully intercepted communication  
26 in violation of the Electronic Communications Privacy Act at 18 U.S.C. §§2511(1)(c),  
27 2520. In December 1996, Mr. Boehner, then the Chairman of the House Republican  
28 Conference, participated, via cellular telephone from Florida, in a conference call with  
29 several other House Republican leaders. The participants discussed the leadership’s  
30 response to findings about to be issued by the House Committee on Standards of Official  
31 Conduct (“Ethics Committee”) with respect to the conduct of Speaker Newt Gingrich,  
32 | and to the Speaker’s expected agreement to accept a reprimand and pay a fine. The suit

1 alleges the following: A Florida couple tape recorded the conversation from a police  
2 scanner in their car, and later met with a Democratic Representative from Florida to  
3 discuss the tape. At the Member's suggestion, the couple personally delivered the tape to  
4 you on January 8, 1997. You were then the ranking Democratic Member of the Ethics  
5 Committee. On the next day, you gave copies of the tape to three major newspapers,  
6 which then ran stories on the party leaders' conversation. Shortly thereafter, you  
7 provided a copy of the tape to the other Members on the committee and resigned from the  
8 committee. The committee chairman then delivered a copy to the U.S. Department of  
9 Justice. ~~No criminal charges were brought against you.<sup>1</sup>~~

10 No criminal charges were brought against you.<sup>2</sup> Mr. Boehner filed the civil suit  
11 against you in U.S. District Court in the District of Columbia in March 1998. In July  
12 1998, the district court granted your motion to dismiss the case, concluding that your  
13 actions were protected by the First Amendment. *Boehner v. McDermott*, No. CIV. 98-  
14 594 TFH, 1998 WL 436897 (D.D.C. July 28, 1998). In September 1999, the U.S. Court  
15 of Appeals for the D.C. Circuit reversed the district court's decision and remanded the  
16 case back to the district court. *Boehner v. McDermott*, 191 F.3d 463 (D.C.Cir.1999).  
17 You filed a petition for *certiorari* on April 25, 2000. *Certiorari* has yet to be granted or  
18 denied.<sup>3</sup>

19 *Legal Expense Trust Approved By House Ethics Committee*

20 You enclose a copy of the letter from the House Ethics Committee, dated October  
21 6, 2000, that conditionally approved the establishment of the Legal Expense Trust. You  
22 also provided a copy of your September 21, 2000, letter to the committee requesting  
23 approval of the establishment of the Trust, along with a copy of the proposed agreement  
24 establishing the Trust. The trust agreement between you, as trustor, and another  
25 individual, as trustee, empowers the trustee to accept funds, property, and services to pay

<sup>1</sup> ~~The Florida couple pled guilty to unlawful interception of the call, and they were fined.~~

<sup>2</sup> The Florida couple pled guilty to unlawful interception of the call, and they were fined.

<sup>3</sup> The above account of the background for *Boehner v. McDermott* was derived principally from the opinions issued in the district and appellate court cases and from Advisory Opinion 1997-27 in which the Commission concluded that Mr. Boehner's use of his campaign funds to finance his suit against you was permissible under 2 U.S.C. §439a and 11 CFR Part 113.

1 legal fees and charges with respect to the purposes described below and Trust  
2 administration.

3 The agreement describes the purposes of the trust as follows:

4 2. Trust Purpose. The sole and exclusive purpose of the Trust is to  
5 provide a proper means for the acceptance of money, property and  
6 services, including, if necessary, pro bono legal services, to provide for all  
7 reasonable, necessary and appropriate legal fees or charges incurred by the  
8 Trustor in connection with his official duties and position in Congress, and  
9 matters bearing on his reputation or fitness for office. To such end, the  
10 Trust shall be available to pay all reasonable, necessary and appropriate  
11 expenses of the Trustor's counsel and such other and usual, customary  
12 expenses that have been or may be incurred in connection with the above-  
13 stated purpose. The Trust may not be used to pay any legal expenses that  
14 arise in connection with a matter that is primarily personal in nature. Trust  
15 funds may be used for no purpose other than that specifically provided  
16 herein. All such payments may be made by the Trustee from either  
17 principal and/or income.  
18

19 In granting you permission, the Ethics Committee noted that the purpose of the  
20 Trust would be to pay legal expenses arising from *Boehner v. McDermott*, and stated that  
21 "[y]our letter further indicates that consistent with the requirements of the [Ethics  
22 Committee's] Legal Expense Fund Regulations, these expenses have arisen in connection  
23 with your official duties and position in Congress and that the matter is one that bears on  
24 your reputation and fitness for office." The Ethics Committee also stated that the terms  
25 of the Trust appeared to be consistent with the Legal Expense Fund Regulations and went  
26 on to describe the public filing and disclosure requirements for such legal expense funds.

27 The Ethics Committee specifically noted that the purpose stated in the Trust  
28 agreement is broader than merely the expenses for *Boehner v. McDermott* and that,  
29 consistent with Ethics Committee regulations, the agreement states that the Trust may not  
30 be used to pay any legal expenses that arise in connection with a matter that is "primarily  
31 personal in nature." The committee asked that you contact it for further guidance if any  
32 question arises as to whether a particular expense is properly payable out of the Trust.  
33 The committee also stated its understanding that the Trust agreement provides for the  
34 payment for legal service provided to you only, and to no other individual.

1 Although not specifically addressed in the Ethics Committee letter, the  
2 Commission also notes that the Trust agreement provides that the trust assets shall be  
3 maintained in accounts established for the exclusive purpose of administering the Trust,  
4 and segregated from your “personal, political, or official funds.” In addition, it provides  
5 that, upon completion of the Trust, any funds or assets remaining in the Trust, shall be  
6 distributed by the Trustee, in his sole and absolute discretion, to the contributors to the  
7 Trust, on a *pro rata* basis.

#### 8 ***Analysis***

9 To respond to your question, the Commission must discuss the nature of the Legal  
10 Expense Trust and whether the donation of your campaign funds to the Trust would be  
11 “personal use” under the Act and Commission regulations. The Commission then  
12 addresses whether the donation of another Member’s campaign funds to the Trust would  
13 constitute “personal use,” and, if so, whether the Act and Commission regulations  
14 prohibit the Trust’s use of such campaign funds.

15 Under the Act and Commission regulations, a candidate and the candidate’s  
16 committee have wide discretion in making expenditures to influence the candidate’s  
17 election, but may not convert campaign funds to the personal use of the candidate or any  
18 other person. 2 U.S.C. §§431(9) and 439a; 11 CFR 113.1(g) and 113.2(d); *see also*  
19 Advisory Opinions 2000-37, 2000-12, 1998-1, and 1997-27. Commission regulations  
20 provide guidance regarding what would be considered personal use of campaign funds.  
21 Personal use is defined as “any use of funds in a campaign account of a present or former  
22 candidate to fulfill a commitment, obligation, or expense of any person that would exist  
23 irrespective of the candidate’s campaign or duties as a Federal officeholder.” 11 CFR  
24 113.1(g). Moreover, 2 U.S.C. §439a and 11 CFR 113.2(a) and (d) specifically provide  
25 that a Member of Congress may use excess campaign funds to pay any ordinary and  
26 necessary expenses incurred in connection with his or her duties as a holder of Federal  
27 office, and may use such funds for “any other lawful purpose.”

28 Commission regulations list a number of expense categories that would constitute  
29 personal use. 11 CFR 113.1(g)(1)(i). Where a specific use is not listed as personal use,  
30 the Commission makes a determination on a case-by-case basis, using the regulation’s

1 definition of personal use at 11 CFR 113.1(g). 11 CFR 113.1(g)(1)(ii).<sup>4</sup> Legal expenses  
2 are among those uses to be analyzed on a case-by case basis. 11 CFR 113.1(g)(1)(ii)(A).  
3 See Advisory Opinions 1998-1, 1997-27, 1997-12, and 1996-24.

4 Based on the underlying circumstances of *Boehner v. McDermott*, the  
5 Commission concludes that the donation of funds from your principal campaign  
6 committee, Friends of Jim McDermott, to the Legal Expense Trust would be permissible  
7 because it would entail the use of campaign funds for an expense that would not exist  
8 irrespective of your duties as a Federal officeholder. The conduct that is at issue in  
9 *Boehner v. McDermott* resulted directly from activities that you engaged in because of  
10 your position at the time as Ranking Minority Member of the Ethics Committee. The  
11 issue of the finding as to the Speaker's activities and the resulting disciplinary action was  
12 a matter of great interest in the House of Representatives. Any discussion by House  
13 Republican leaders of how to react to the pending agreement between the Speaker and the  
14 Ethics Committee would have been of significant concern to you because of your position  
15 as Ranking Member and your prior consideration of the Speaker's activities as a member  
16 of the committee, and it appears that you received the tape because of your position. See  
17 Advisory Opinion 1997-27 where the Commission concluded that Mr. Boehner could use  
18 campaign funds to finance his case against you based on the fact that his involvement in  
19 the conversation was in pursuit of his duties as a Member and as part of the House  
20 Republican leadership, and the fact that the unlawful interception or disclosure for which  
21 he seeks the judicial remedy of compensation occurred as a result of interest in the  
22 content, which related to the House Republican leadership and the Ethics Committee, and  
23 interest in the fact that the participants were House Republican leaders.

24 The Commission concludes that the donation of your campaign funds to the Trust  
25 is permissible on the assumption that the Trust's funds will be used only for: (1) expenses  
26 related to *Boehner v. McDermott* or other legal expenses arising out of the same set of

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<sup>4</sup> In explaining the application of the case-by-case approach, the Commission:  
reaffirm[ed] its long-standing opinion that candidates have wide discretion over the use of  
campaign funds. If the candidate can reasonably show that the expenses at issue resulted  
from campaign or officeholder activities, the Commission will not consider the use to be  
personal use.

Explanation and Justification, *Expenditures; Reports by Political Committees; Personal Use of Campaign Funds*, 60 Fed. Reg. 7862, 7867 (February 9, 1995).

1 facts; (2) the administrative expenses necessary to administer the Trust (including  
2 reasonable compensation to the Trustee); and (3) the dissemination of funds remaining at  
3 the termination of the Trust in accordance with the Trust agreement in order to prevent  
4 the personal use of your campaign funds by others. The Commission also assumes that  
5 the Trust accounts will be segregated from any other accounts, such as your personal  
6 accounts. The Commission notes that, even though the Ethics Committee concluded or  
7 assumed that the expenses "have arisen in connection with your official duties and  
8 position in Congress," the Commission has the authority to interpret and enforce the  
9 personal use prohibition of 2 U.S.C. ~~§439a~~ 439a and should reach its own conclusions as  
10 to whether personal use of campaign funds would result. *See Explanation and*  
11 *Justification, Expenditures; Reports by Political Committees; Personal Use of Campaign*  
12 *Funds*, 60 *Fed. Reg.* 7862, 7871 (February 9, 1995).

13 The regulations on personal use also address "third party payments" to candidates  
14 at 11 CFR 113.1(g)(6). Notwithstanding that the use of funds for a particular expense  
15 would be a personal use under 11 CFR Part 113, payment of that expense by any person  
16 other than the candidate or the campaign committee shall be a contribution under 11 CFR  
17 100.7, unless the payment would have been made irrespective of the candidacy. The  
18 regulations list three examples of payments that are considered to be irrespective of  
19 candidacy. One of the examples is "a donation to a legal expense trust established in  
20 accordance with the rules of the United States Senate or the United States House of  
21 Representatives." 11 CFR 113.1(g)(6)(i). Therefore, donations to the Jim McDermott  
22 Legal Expense Trust would not be contributions, and would not be subject to the  
23 limitations and prohibitions of the Act. *See* 2 U.S.C. §§441a, 441b, 441c, 441e, 441f, and  
24 441g.

25 Commission regulations at 11 CFR 113.1(g)(6)(i), ~~nonetheless, permit unlimited~~  
26 ~~donations to a legal expense trust, but~~ do not address whether a ~~candidate or~~ Member of  
27 Congress may use any of his campaign funds to donate to such a trust set up by another  
28 Member. Given the nature of the Trust and the nature of the litigation for which the Trust  
29 was established, the Commission concludes that donations of other Members' campaign  
30 funds to this legal expense trust would not constitute personal use of campaign funds by

1 those Members, and would therefore be permissible under 2 U.S.C. §439a and 11 CFR  
2 113.1(g). Although your legal expenses for *Boehner v. McDermott* would not exist  
3 irrespective of your duties as a Federal officeholder, they do exist irrespective of the  
4 duties of other Federal officeholders, including other Members who wish to donate their  
5 campaign funds to the Trust. Given your formation of a legal expense trust, under House  
6 rules, for legal expenses that would not exist irrespective of your officeholder duties, a  
7 different approach may be appropriate.

8 As noted above, The Commission has concluded that donations to a legal  
9 expense trust, formed and implemented under the rules of the U.S. House of  
10 Representatives, are not contributions even though in certain circumstances the use of  
11 such trust funds could be a personal use under 11 CFR 113.1(g). Such expense trusts are  
12 specifically established independently of a campaign, and are used for several purposes  
13 other than influencing a Federal election, including legal expenses related to the  
14 performance of the officeholder's official duties or position in Congress. Moreover, they  
15 are formed under House rules (Rule 26) and interpretations issued by the Ethics  
16 Committee which restrict the trusts' purposes, the sources and uses of donations, and the  
17 disposition of any residual funds. In singling out trusts governed by House (and U.S.  
18 Senate) rules, the Commission stated that donations to other legal expense funds are not  
19 so protected and are to be "examined on a case by case basis." 60 *Fed. Reg.* at 7871.  
20 Therefore, it is clear that the Commission has granted special status to legal expense  
21 trusts established under Congressional rules.<sup>5</sup>

22 The House rules do not prohibit ~~allow~~ Members from ~~to~~ using their campaign  
23 funds to  
24 support another Member's trust, and also impose a \$5,000 yearly limit on donations from  
25 any individual or organization.<sup>6</sup> In view of the nature of these trusts as special vehicles  
26 created under House rules, and the fact that the use of the funds donated to the trust will  
27 be related to your duties as an officeholder, and not for your personal use under the Act  
28 and Commission regulations, the Commission will follow, in these special circumstances,

<sup>5</sup> Such deference has been granted even though the legal expense trust for a House Member may be set up for legal expenses arising in connection with his or her candidacy for or election to Federal office.

<sup>6</sup> The House rules also prohibit contributions from registered lobbyists or agents of foreign principals.



1 the treatment accorded by the House of Representatives with respect to the use of  
2 campaign funds of its Members. Therefore, in the case of a House Member's legal  
3 expense trust where the funds are to be used exclusively for expenses that do not arise  
4 irrespective of the trustor's officeholder duties, donations by other Members from their  
5 campaign funds, if permitted under the rules of the House, will be viewed as permissible.  
6 ~~a use of such funds "for any other lawful purpose." 2 U.S.C. §439a, 11 CFR 113.2(d).~~  
7 The

1 Commission therefore concludes that, under the facts and conditions presented in your  
2 request, the ~~Trust Friends of Jim McDermott~~ may accept donations from the principal  
3 campaign (or other authorized) committees of Mr. Stark and other House Members. Such  
4 donations will not be contributions under the Act; nor will they be a prohibited personal  
5 use of campaign funds. Any authorized committee that makes such donations to the  
6 Trust is, however, required to disclose them as other disbursements on reports it must file  
7 under the Act and Commission regulations. 2 U.S.C. §434(b)(4)(G) and (6)(A); 11 CFR  
8 104.3(b)(2)(vi) and (4)(vi).

9 The Commission expresses no opinion regarding the application of any rules of  
10 the U.S. House of Representatives or any tax ramifications of the proposed activity  
11 because those issues are not within its jurisdiction.

12 This response constitutes an advisory opinion concerning the application of the  
13 Act, or regulations prescribed by the Commission, to the specific transaction or activity  
14 set forth in your request. See 2 U.S.C. §437f.

15 Sincerely,

16  
17 Danny L. McDonald  
18 Chairman  
19

20 Enclosures (AOs 2000-37, 2000-12, 1998-1, 1997-27, 1997-12, and 1996-24)